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Supreme Court, U.S.
FILED

No. _____ 001105 JAN 8 2001

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In The
Supreme Court of the United States
October Term, 2000

KATHERINE S. YOUNGBLOOD, individually and on behalf of Youngblood & Associates P.L.L.C., formerly known as Youngblood & White, P.L.L.C.,

Petitioners,

versus

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; MARY J. MILLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether litigants in federal court have a statutory or constitutional right to receive some explanation, however brief, of the basis for an adverse ruling.

2. Whether this Court, in the exercise of its supervisory authority over the inferior federal courts, should establish some limit on the extent to which appeals may be disposed of in the circuit courts of appeals by means of unpublished order opinions that do not set out any reasons or rationale for the appellate decision.

Parties Below

Petitioners are Katherine Youngblood and her firm, Youngblood & Associates, PLLC.

Respondents are the Prudential Insurance Company of America and Mary J. Miller.

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No. _____

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KATHERINE S. YOUNGBLOOD, individually and on behalf of Youngblood & Associates P.L.L.C., formerly known as Youngblood & White, P.L.L.C.,

Petitioners,

versus

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; MARY J. MILLER,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Katherine S. Youngblood and her firm, Youngblood & Associates P.L.L.C., respectfully petition for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit is not reported, but it is reproduced in the Appendix to this Petition at A—1 et seq. The opinion of the Fifth Circuit denying Petitioner's Petition for Rehearing En Banc is not reported, but it is reproduced in the

Appendix to this Petition at B—1 et seq. The opinion of the district court denying Petitioner's motion to remand is not reported, but it is reproduced in the Appendix to this Petition at C—1 et seq. The opinion of the district court imposing sanctions is not reported, but it is reproduced in the Appendix to this Petition at D—1 et seq.

JURISDICTION

The opinion and judgment of the Fifth Circuit was rendered on September 13, 2000. The decision of the Fifth Circuit denying Petitioners' Petition for Rehearing En Banc was rendered on October 13, 2000. Pursuant to Supreme Court Rule 13.1, this petition has been filed within ninety days of the denial of rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portion of the due process clause, U.S. Const. amend. V, is set out below.

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATUTORY PROVISIONS INVOLVED

The text of 28 U.S.C. § 1291 is set out below.

> The courts of appeal (other than the United States Court of Appeals for the Federal circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the Unites States Court of

Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

I. Factual summary

This action was brought on March 31, 1998, in the state district court of Fort Bend County, Texas, by Petitioners Katherine S. Youngblood and her firm, Youngblood & Associates, P.L.L.C., against Respondents The Prudential Insurance Company of America and Mary J. Miller, an in-house attorney employed by Prudential. Petitioners asserted a variety of state law claims related to the retention of the Petitioners to provide legal representation to Prudential and the ultimate termination of this representation.

By notice of June 8, 1998, Respondents removed the case to the United States District Court for the Southern District of Texas, Houston Division. Petitioners' motion to remand the case was denied by the district court on September 8, 1998, by means of a one sentence order: "Plaintiff's Motion to Remand is hereby DENIED." *See* Appendix C. Neither in this order nor at any other point did the district court ever provide any rationale for the denial of Petitioners' motion to remand.

A jury was selected in this case on May 6, 1999, and the trial began on May 10. On May 12, after the testimony of Petitioners' first witness had concluded, the district court sua sponte granted judgment as a matter of law to Respondents as to all of Petitioners' claims.

On June 17, 1999, Respondents filed a motion in the district court asking that they be awarded their attorney fees and expenses under the district court's inherent power to sanction

Petitioners for having acted in "bad faith, vexatiously, wantonly, or for oppressive reasons." On July 26, 1999, the district court granted this motion, awarding Respondents $100,000 in attorney fees and $32,287 in expenses. The district court's order, which consisted of the district court filling in the blanks on a pro forma proposed order that had been submitted by Respondents, reads in its entirety as follows:

> On this day the Court heard evidence and considered Defendant's Motion for Attorneys' Fees and Expenses and any responses thereto. The Court determined that plaintiffs had filed and/or conducted this litigation in bad faith, vexatiously, wantonly, or for oppressive reasons. The Court thus decided to grant the motion.
>
> It is, therefore, ORDERED that Plaintiffs pay to Defendants the amount of $100,000 in attorney fees and $32,287 in expenses.

See Appendix D. Neither in this order nor at any other point did the district court ever identify either the conduct by Petitioners that the court found sanctionable or the basis for the amount of sanctions imposed.

On June 4, 1999, and on August 19, 1999, Petitioners filed a timely Notice of Appeal from both the district court's substantive judgment and its order imposing sanctions. The two appeals were consolidated by the Fifth Circuit, which on September 13, 2000, entered its order and judgment affirming the district court in all respects relevant to this petition. As it relates to the circuit court's decision to affirm the district court's denial of Petitioners' motion to remand and the district court's imposition of inherent powers sanctions, the circuit court's opinion reads as follows: "After reviewing the record, considering the briefs of the parties and argument of counsel

. . ., we are persuaded that the district court committed no error." *See* Appendix A. On October 13, 2000, the Fifth Circuit denied Petitioners' Petition for Rehearing En Banc. *See* Appendix B.

II. Basis for federal jurisdiction

Petitioners have from the outset asserted that the district court did not possess diversity jurisdiction. Such jurisdiction was asserted by Respondents, and accepted by the district court, based upon 28 U.S.C. § 1332 and 28 U.S.C. § 1441. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

Review by this Court is sought pursuant to Supreme Court Rules 10.1(a) and 10.1(c). As set out below, the decision of the Fifth Circuit is in conflict with decisions of other circuit courts. As set out below, the decision of the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the district court, as to call for an exercise of the Court's supervisory power. As set out below, the decision of the Fifth Circuit decided an important question of federal law that has not been, but should be, settled by this Court.

I. A factual amplification

To appreciate the significance of the combined effect of the opinions of the district court and the court of appeals, it will be initially helpful for the Court to understand the two substantive issues that were appealed by Petitioners to the Fifth Circuit as to which review in this Court is now sought. For purposes of this brief, a summary of the facts relevant to these

two issues can be briefly set out.

A. The denial of Petitioners' motion to remand

The diversity jurisdiction of the district court turned on the claims brought by Petitioners against the nondiverse defendant, Respondent Mary Miller. In substance, the Petitioners asserted in their state court complaint that Respondent Miller, an in-house attorney for Respondent Prudential, had fraudulently induced Petitioner Youngblood in negotiations leading up to the agreement between the parties upon the terms of a contract under which Petitioner Youngblood & Associates would provide legal representation for Respondent Prudential in a specified geographical area and with respect to specified types of claims. Petitioners further asserted that, in the process of negotiating this contract, and in actions taken thereafter, Miller had breached a fiduciary duty owing to Petitioner Youngblood.

There should have been little to cause the district court to hesitate in granting the Petitioners' motion to remand this case back to the Texas state court after it had been removed by Respondents to federal court under an assertion of diversity jurisdiction. There was no dispute by Respondents that Miller — who along with Petitioners is a resident of Texas — was nondiverse. The district court was therefore required to grant Petitioners' motion to remand unless Respondents could establish that Respondent Miller had been fraudulently joined as a defendant in order to defeat the right of Respondent Prudential to remove the case to federal court. This, in turn, required Respondents to establish that there was "absolutely no possibility" that Petitioners' claims against Respondent Miller could survive a motion to dismiss in the Texas state court. *See, e.g., Griggs v. State Farm Lloyds*, 181 F.3d 694, 698 (5th Cir.

1999)("[T]he removing party must prove that there . . . is absolutely no possibility that the plaintiff will be able to establish a cause of action against the non-diverse defendant in state court."). Differently expressed, the district court was required to grant the Petitioners' motion and remand the case to the Texas state court in which it had been originally filed by Petitioners unless the court could "predict with absolutely certainty" that the claims against Respondent Miller would be summarily dismissed by a Texas state court. *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 554 (5th Cir. 1981).

For purposes of this brief, it is not necessary to address the wealth of Texas caselaw relied upon by Petitioners to establish the viability of their claims against Respondent Miller. It is enough, for present purposes, to note that *the district court itself* twice denied fully briefed pretrial motions by Respondent Miller seeking to have the claims against her dismissed. It again denied the same motion when it was presented orally at the beginning of trial. It was only when counsel for Respondent Miller argued that a failure to dismiss the claims against her would be fatal to the district court's jurisdiction to hear the Petitioners' claims against Respondent Prudential that the district court, on the fourth attempt by Respondent Miller to obtain such relief, finally dismissed Petitioners' claims against her in the midst of trial.

Under these circumstances, Petitioners contend, as further set out below, that they were minimally entitled to some kind of explanation — however brief — from the district court as to its reasons for denying Petitioners' motion to remand. No such explanation was provided. The district court's ruling on this motion consisted in its entirety of a one sentence statement: "Plaintiff's Motion to Remand is hereby DENIED."

This absence of explanation was a central part of Petitioners' appeal to the Fifth Circuit. They contended that, under the Fifth Circuit standard requiring that the district court be able to "predict with absolute certainty" that a Texas state court would summarily grant a motion to dismiss the claims against Respondent Miller, that standard could not possibly have been satisfied where the district court itself repeatedly denied *the identical motion.* If there was some reason why Petitioners were nevertheless not entitled to prevail on this aspect of their appeal, they would respectfully suggest that any such reason is far from obvious. Under these circumstances, Petitioners contend, as further set out below, that they had a right to receive, at a minimum, some kind of explanation — however brief — from the court of appeals as to its reasons for refusing this aspect of Petitioners' appeal. No such explanation was provided. The Fifth Circuit's ruling on this aspect of Petitioners' appeal consists, as did the district court's, of a single sentence: "After reviewing the record, considering the briefs of the parties and argument of counsel . . ., we are persuaded that the district court committed no error."

B. The inherent powers sanctions

The chronology of the district court and appellate court consideration of the inherent power sanctions is, if anything, even more graphic. After the district court had entered the sua sponte judgment as a matter of law against Petitioners at the conclusion of the testimony of their first witness, Respondents sought inherent powers sanctions consisting of their attorney fees and expenses based upon their contentions that the claims that the Petitioners had brought were meritless and that their counsel had engaged in discovery abuse. Together with their motion seeking such sanctions, they submitted — as required by local rules — a pro forma proposed order by which the district court could grant the motion. This proposed order, with

blanks filled in, is set out as Appendix D.

Petitioners contend, as further set out below, that they were minimally entitled to some kind of explanation — however brief — from the district court as to what they had done that merited inherent powers sanctions and the basis for fixing such sanctions at some $132,000. No such explanation was provided. The district court's ruling on Respondents' motion consisted in its entirety of the district court filling in the blanks on the Respondents' pro forma proposed order and then signing it. As filled in with the amounts by the district court, the order reads as follows:

> On this day the Court heard evidence and considered Defendant's Motion for Attorneys' Fees and Expenses and any responses thereto. The Court determined that plaintiffs had filed and/or conducted this litigation in bad faith, vexatiously, wantonly, or for oppressive reasons. The Court thus decided to grant the motion.
>
> It is, therefore, ORDERED that Plaintiffs pay to Defendants the amount of $100,000 in attorney fees and $32,287 in expenses.

See Appendix D.

As the Court will note, this order does not specify what conduct the district court believed Petitioners had engaged in that would merit any degree of sanctions. Nor does it specify the basis for the amount of the sanctions. Under these circumstances, the Fifth Circuit's reversal of the district court as to this issue should have been compelled. That court has repeatedly instructed district courts that inherent power sanctions *must* be supported with specific factual findings setting out the misconduct being sanctioned and the basis for

the amount of the sanctions. *See Crenshaw v. General Dynamics Corp.*, 940 F.2d 125 (5th Cir. 1991)("[T]he [district] court must make specific findings as to the frivolousness of the suit, or the bad faith of a party before fees are awarded on such a basis. . . . . In this case, the trial court made no such findings as to the reason it awarded fees in favor of General Dynamics. Accordingly, remand is warranted."); *Dow Chem. Pacific Ltd. v. Rascator Maritime S.A.*, 782 F.2d 329, 345 (5th Cir. 1986)("[T]he [district] court merely referred to a 'callous indifference to the law ... from the inception of these actions in 1979 to the day of trial' without identifying any particular act or omission that it thought gave the required clear evidence of their bad faith conduct of the litigation. This statement does not contain the 'high degree of specificity in the factual findings' that this Court requires in order to sustain an award of attorneys' fees under the bad-faith exception."); *Topalian v. Ehrman*, 3 F.3d 931, 935-36 (5th Cir. 1993)("We must vacate the trial court's award of sanctions against Lopez; and remand the case for further factual findings to support that award. We reach this conclusion because the district court's findings provide an insufficient basis for reviewing the district court's decision for an abuse of discretion, and because in *Thomas* [*v. Capital Security Servs.*, 836 F.2d 866, 876-77 (5th Cir. 1988)(en banc)] we required specific factual findings to support awards as large as this one.").

If, in spite of this requirement, there was some reason why Petitioners were nevertheless not entitled to prevail on this aspect of their appeal, they would respectfully suggest that any such reason is far from obvious. Under these circumstances, Petitioners contend, as further set out below, that they were minimally entitled to some kind of explanation — however brief — from the court of appeals as to its reasons for denying this aspect of Petitioners' appeal. No such explanation was provided. Again, the court of appeals' ruling on this aspect of

Petitioners' appeal consists of a single sentence: "After reviewing the record, considering the briefs of the parties and argument of counsel . . ., we are persuaded that the district court committed no error."

C. Summary

The Petitioners are before this Court complaining of two aspects of the judgments below: (1) the refusal to remand this case back to the state court from which Petitioners believe it was improperly removed by Respondents and (2) the imposition of very substantial punitive sanctions on the Petitioners under the district court's inherent powers. The Petitioners have never received even the most minimal explanation for either of these things — not from the district court and not from the Fifth Circuit. The question presented by this appeal is whether this violates the Petitioners' statutory entitlement to an appeal as of right, whether this violates their constitutional right to due process, and whether this Court should, in any event, utilize its supervisory powers over the lower federal courts and provide instructions on the permissible use of unpublished summary opinions.

II. The issue

A. Opinions without reasons

For some thirty years now, a revolution of sorts has been underway in the federal courts. Until relatively recently, virtually every decision by the courts of appeals was supported by a published statement of the court's rationale. The very definition of a judicial "opinion" continues to embrace this concept. *See generally* BLACK'S LAW DICTIONARY 1092 (6th ed. 1990)(defining "opinion" to be a "statement by a judge or a court of the decision reached in regard to a cause tried or argued

before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based.").

In 1964, however, the Judicial Conference of the United States, responding to an increased appellate caseload, recommended that the appellate courts authorize "the publication of only those opinions which are of general precedential value." JUDICIAL CONFERENCE OF THE UNITES STATES REPORT 11 (1964). The Board of the Federal Judicial Center proposed in 1972 that the federal appellate courts establish plans that would limit publication and forbid citation of unpublished opinions. *See* BOARD OF THE FEDERAL JUDICIAL CENTER, RECOMMENDATION AND REPORT TO THE APRIL 1972 SESSION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE PUBLICATION OF COURTS OF APPEALS OPINIONS (1972). This was endorsed by the Judicial Conference later that year and each circuit was directed to devise a publication plan. *See* JUDICIAL CONFERENCE OF THE UNITES STATES REPORT 33 (1972). By 1973, the Federal Judicial Center was able to publish a Model Rule for the circuit court's use to limit publication. *See* ADVISORY COUNCIL FOR APPELLATE JUSTICE, FJC RESEARCH SERIES NO. 73-2, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (1973). By that same year, each of the eleven circuit courts had adopted rules for nonpublication. JUDICIAL CONFERENCE OF THE UNITED STATES REPORT 12 (1974).

Once authorized, the use of unpublished opinions by the circuit courts quickly became widespread. By the 1978-79 reporting year, about two thirds of appeals were being disposed of by means of unpublished opinions. *See* William Reynolds & William Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 586 (1981). By this point, the Fifth Circuit was issuing published opinions in only 58.6% of its decisions. *See* Martha Dragich, *Will the Federal Courts of*

Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?, 44 AM. U. L. REV. 757, 761 n.14 (1995). By 1987, that percentage had dropped to 46.7%. *See id.*

One effect of the nonpublication rules was that, as academic commentators and some judges soon noted, the quality of the unpublished opinions was dramatically lower than the quality of published opinions. Professors Reynolds and Richman tactfully observe in this regard that "anyone who reads even a small number of unpublished opinions must conclude, given their brevity and informality, that considerable effort has been spared in their preparation." William Reynolds & William Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 594-95 (1981). Judge Howard Markey of the Federal Circuit has been less tactful, describing unpublished opinions as "junk." Chief Judge Howard T. Markey, REMARKS AT THE SEVENTH ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (MAY 24, 1989), 128 F.R.D. 409, 419 (1989).

The generation of substandard opinions was almost certainly an *intended* effect of the rules since the only way in which nonpublication could possibly assist the appellate courts in dealing with increased caseload is by permitting less time to be spent on the unpublished opinions, which would inevitably correspond to a lower quality of opinion. The whole idea appears to have been that, freed by the nonpublication rules from any concern that a poorly reasoned, or carelessly written, opinion could negatively effect the body of the circuit's caselaw, judges could spend less time with each opinion that was not to be published and would thereby be able to dispose of more appeals than they otherwise could.

But this was apparently not enough. Although no longer needing to be concerned that the reasoning in unpublished opinions could later come back to haunt the court, the circuit court judges nevertheless were constrained in their ability to give sufficiently short shrift to any particular unpublished opinion by the fact that the litigants, at least, would receive it. And the Lexis and Westlaw databases that make "unpublished" opinions nevertheless widely available to the bar greatly increased the need, even for unpublished opinions, to craft an opinion of at least some plausibility.

These concerns caused the circuit courts to take their unpublished opinion policies to their logical conclusion: the use of unpublished opinions that contain little or nothing beyond an announcement of the result of the appeal — a "nonopinion." In their exhaustive survey of unpublished opinions for the 1978-79 reporting period, which remains the most complete such survey that has been performed, professors Reynolds and Richman examined, circuit by circuit, the extent to which the circuit courts were attempting in unpublished opinions to articulate the rationale for their rulings. They found that, in the Fifth Circuit, 36% of the unpublished opinions could be described as "reasoned." *See* William Reynolds & William Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 602 (1981). About 5% of the unpublished opinions were decided on the basis of the opinion by the district court or agency. *See id.* Fully 59% of the unpublished opinions were found to have "no discernable justification." *See id.* As the authors would conclude, "[p]erhaps the most flagrant failure to provide reasons occurs in the Fifth Circuit." *Id.* at 603.

B. The cost of unpublished nonopinions

The use by the circuit courts of unpublished opinions, and particularly the use of unpublished nonopinions — those in which only the result is announced with no attempt to provide the rationale supporting the court's decision — has been from the outset the subject of sustained criticism from both academic writers and circuit court judges themselves. The most obvious objection to this practice is that it removes one of the more effective devices yet developed to ensure the accuracy of the court's decision. As noted by Judge Coffin,

> [a] remarkably effective device for detecting fissures in accuracy and logic is the reduction to writing of the results of one's thought processes . . . . Somehow, a decision mulled over in one's head or talked about in conference looks different when dressed up in written words and sent out into the sunlight . . . . [W]e may be in the very middle of an opinion, struggling to reflect the reasoning all judges have agreed on, only to realize that it simply "won't write." The act of writing tells us what was wrong with the act of thinking.

F. Coffin, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 57 (1980); *see also* Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1292 (1975)("The necessity for justification is a powerful preventive of wrong decisions."); *cf. United States v. Forness*, 125 F.2d 928, 942 (2d Cir. 1942)(Frank, J.)("[A]s every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that . . . the facts are thus-and-so gives way when it comes to expressing that impression on paper.").

The unpublished nonopinion also removes what has always been understood to be the principal constraint on judges: the obligation to reach decisions that are justified by the law and not simply the judge's personal preference for how a case should be resolved. *See generally* Philip Soper, A THEORY OF LAW 111 (1984). That is, a published decision setting out the court's rationale constrains the judge in two respects. First, a judge cannot in such a decision simply ignore the existing law or apply that law to the facts at hand in an irrational or arbitrary manner without exposing his illicit purpose, both to the parties and to the bar and bench generally. Second, the decision, once published, becomes part of the circuit's body of caselaw and litigants can be expected to rely upon it in future cases. This, in turn, will require the judge in those future cases either to devise a method of greater or lesser plausibility to distinguish the initial case or else live with the bad law or reasoning that characterize it. Karl Llewellyn's description of this constraint is perhaps the best known.

> In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause in hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steadying factor which aids reckonability.

Karl Llewellyn, THE COMMON LAW TRADITION 26 (1960).

The unpublished nonopinion, by contrast, permits the judge inclined to do so to avoid both of these perils. Because — by definition — there is no rationale given by the court to

support its judgment in such cases, there is nothing that can be seen as illegitimate by those whose good opinion the judge may value. *See* William Reynolds & William Richman, ***The Non-Precedential Precedent — Limited Publication and No-Citation Rules in the United States Courts of Appeals,*** 78 COLUM. L. REV. 1167, 1203 (1978)("[T]he real accountability of the courts of appeals is to the bench, the bar, the scholars, and the public. Unpublished opinions, especially ones that cannot be cited, will generally not receive critical commentary from those groups for the obvious reason that they will go unnoticed."). So too, the absence of any stated rationale prevents as a practical matter any reliance on the decision by future litigants; nothing can return to haunt the judge.

Another constraint on circuit court judges is the need to fashion a decision that can withstand scrutiny in this Court. A published decision containing the circuit court's rationale permits litigants to prepare a certiorari petition by use of that rationale, which may be in conflict with the decisions of this Court or of other circuit courts. Similarly, the rationale may expose the fact that the circuit court's decision violates the litigant's statutory or constitutional rights.

The unpublished nonopinion again avoids this risk. The prospect of review in this Court — already a struck-by-lightning possibility under the best of circumstances — diminishes to the vanishing point when it is an unpublished opinion as to which review is sought even in the case of unpublished opinions that make some effort to set out the circuit court's rationale. *See id.* at 1202-03.

In the case of unpublished opinions without a statement of the circuit court's rationale, the prospect of obtaining review in this Court becomes still smaller. Here, there is not even a theoretical question of the unpublished decision containing "bad

law." There is no law, or anything else beyond the bare announcement of the result of the appeal, contained in such opinions. There is, for the same reason, not even a theoretical question of a circuit split. The putative certiorari petitioner finds herself — as do the Petitioners here — in the position of being unable to point plausibly to any of the Rule 10 criteria as justifying review in this Court with respect to the merits of the circuit court's decision.

C. Widespread criticism

The circuit courts, uninhibited by any guidance from this Court, have uniformly adopted rules permitting both nonpublication and the disposition of appeals without any explanation, however brief, of the court's rationale. Such rules have been in place for almost thirty years. But in this instance, long usage has not brought with it any general conclusion of regularity.

As noted by the principal academic commentators in this area, "[a] key characteristic of decisions without opinions is their failure to provide the parties or the court below with any hint as to the court's reasoning. Accordingly, the practice under these rules has been uniformly condemned by commentators, lawyers, and judges." William Reynolds & William Richman, *The Non-Precedential Precedent — Limited Publication and No-Citation Rules in the United States Court of Appeals*, 78 COLUM. L. REV. 1167, 1174 (1978)(footnotes omitted).

"Uniformly condemned" may be hyperbole, but not by much. Directly or implicitly, judges, lawyers, and academic commentators have indeed consistently attacked the basic premises underlying the use by the circuit courts of summary orders to decide appeals.

Individual justices and circuit court judges have with some frequency noted the importance of reasoned opinions to support appellate decisions. Justice Scalia has thus noted that, unlike a baseball umpire, a judge must give reasons. This is the tradition of western jurisprudence. The outcome and consequences are not sufficient to tell whether a decision is a good one; one must know the reasons given. Antonin Scalia, THE PRESS AND THE LAW, speech given at Washington Hebrew Congregation (Mar. 4, 1990). Justice Stevens has reached a similar conclusion.

> The judges [in former times] were guided by few written laws, but developed a meaningful set of rules by the process of case-by-case adjudication. Their explanations of why they decided cases as they did provided guideposts for future decisions and an assurance to litigants that like cases were being decided in a similar way. Many of us believe that those statements of reasons provided a better guarantee of justice than could possibly have been described in a code written in sufficient detail to be fit for Napoleon.

Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 472 (1981)(Stevens, J., dissenting).

Judge Patricia Wald of the D.C. Circuit has reached the same conclusion. "My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the court that a bare signal of affirmance, dismissal, or reversal does not." Patricia Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge,* 42 MD. L. REV. 766, 782 (1983).

Judge Holloway of the Tenth Circuit has agreed.

> [T]he basic purpose for stating reasons within an opinion or order must never be forgotten — that the decision must be able to withstand the scrutiny of analysis, against the record evidence, as to soundness under the Constitution and the statutory and decisional law we must follow, as to its consistency with our precedents. Our orders and judgments, like our published opinions, should never be shielded from searching examination.

In re Rules of the United States Court of Appeals for the Tenth Circuit, Adopted Nov. 18, 1986, 955 F.2d 36, 38 (10th Cir. 1992)(Holloway, C.J., dissenting).

Judge Rubin of the Fifth Circuit has reached the same conclusion.

> Every judge should be required to give his reasons for a decision, and those reasons should be sufficient to explain the result to the litigants but also to enable other litigants to comprehend its precedential value and limits to its authority.

Alvin Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648, 655 (1980).

Dating to the point at which the current nonpublication rules were being adopted by the circuit courts, the bar has been careful to distinguish between the use of nonpublished opinions, as to which reasonable persons may disagree, and the use of nonpublished opinions containing no statement of the circuit court's rationale, which has been very consistently opposed.

> Every decision should be supported, at minimum, by a citation of the authority or statement of grounds upon which it is based. When the lower court decision was based on a written opinion that adequately expresses the appellate court's view of the law, the reviewing curt should incorporate that opinion or such portions of it as are deemed pertinent, or, if it has been published, affirm on the basis of that opinion.

ABA COMMISSION OF STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS 58 (1977).

> We recommend that in every case there be some record, however brief, and whatever the form, of the reasoning which impelled the decision. . . . Opinions can be signed or unsigned, published or unpublished, but in each case the litigants and their attorneys would be apprised of the reasoning which underlies the conclusion of the court.

COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 50 (1975).

> The most dramatic evidence of the importance which attorneys attach to a written record of the reason for a decision can be found in the view expressed by more than two-thirds of the attorneys surveyed that the due process clause of the Constitution should be held to require courts of appeals to write at least a brief statement of the reasons for their decisions.

Id. at 69.

III. The effect on Petitioners

If ever there were opinions that "wouldn't write," they would be the opinions never written by the district and circuit courts in the present case. On the Petitioners' motion to remand, a written opinion by the district court would have had to explain how the court could "predict with absolute certainty" that a Texas state court would grant a motion to dismiss Petitioners' claims against Miller, the nondiverse defendant. On the sanctions, a written opinion by the district court would have had to explain how the conduct alleged to be sanctionable in Respondents' sanctions motion, the bringing of assertedly meritless claims and discovery abuses by Petitioners' counsel, could possibly satisfy this Court's standard for such sanctions — which requires a showing that "fraud has been practiced upon [the district court], or that the very temple of justice has been defiled," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) — and how the sanctions, and their amount, could possibly satisfy the Fifth Circuit standard — which recognizes that "the threshold for the use of inherent power sanctions is high. . . . . Such powers may be exercised only if essential to preserve the authority of the court and the sanction chosen must employ the least possible power adequate to the end proposed," *Scaife v. Associated Air Center, Inc.*, 100 F.3d 406, 411 (5th Cir. 1996).

The Fifth Circuit's task would have been harder still. On the motion to remand, a written opinion by that court affirming the district court would have had to explain how the district court could possibly have been able to "predict with absolute certainty" that a Texas state court would summarily grant a motion to dismiss Petitioners' claims against Miller when the district court itself repeatedly denied identical motions by Miller seeking the dismissal of these claims. On the sanctions, a written opinion by the circuit court affirming such

sanctions would have had to explain how the district court could be affirmed based on its having simply filled in the blanks for dollar amounts on Respondents' proposed order when the long standing Fifth Circuit rule requires specific factual findings that, at a minimum, specify the conduct being sanctioned and the basis for the amount of the sanctions.

With deference to the district and circuit courts, Petitioners would respectfully suggest that it is simply not possible to write reasoned opinions on the motion to remand and the sanctions and reach the conclusions arrived at by those courts without dramatically changing the law. Petitioners lost on both of these issues, before both courts, precisely and solely because no such opinions were required.

IV. The statutory and constitutional grounds for objection

A. The statutory right to reasons

Litigants in the federal district courts are granted an appeal as of right to the circuit courts. *See* 28 U.S.C. § 1291. Neither this Court nor, apparently, any other has ever considered what must be minimally provided to satisfy this statutory right to appellate review. There is academic concern, however, that the use by the circuit courts of unpublished opinions — and in particular the use of unpublished order opinions of the kind used by the Fifth Circuit in this case that do not contain any statement of the circuit court's rationale — has effectively transformed the circuit courts into certiorari courts. *See* William Richman & William Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 293 (1996)("Although Congress has given all losing litigants a statutory right to 'appeal,' decisional shortcuts have had the

practical effect of transforming the courts of appeals into certiorari courts."); *see also* William Reynolds & William Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 626 (1981)("The conclusion is inescapable that, with regard to a large part of their caseload, the circuit courts have transformed themselves, contrary to congressional mandate, into certiorari courts.").

This Court should grant review to establish the limits imposed by 28 U.S.C. § 1291 on the circuit courts' authority to issue unpublished opinions that contain no statement, however brief, of the court's rationale.

B. The constitutional right to reasons

In dicta, this Court has previously suggested that the courts of appeals have wide latitude with respect to whether and how to write opinions. *See Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972). The Court has not, however, expressly considered the constraint imposed on this latitude by the due process rights of litigants.

This is somewhat surprising. When the Court has considered challenges to decisions by officers of the *executive* branch, it has had little difficulty in finding that an essential part of the due process to which those effected by such decisions are entitled is a statement of the reasons for the officer's decision. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 267 (1970)(holding that statement of reasons for decision is one of "minimal procedural requirements" to justify termination of welfare benefits); *Morrissey v. Brewer*, 408 U.S. 471 (1972)(holding that due process requires statement of reasons for parole revocation); *Wolff v. McDonnell*, 418 U.S. 539 (1974)(holding that due process requires statement of reasons

for revocation of inmate's good time credits); *Goss v. Lopez,* 419 U.S. 565, 581 (1975)(requiring statement of reasons for suspension of student from school). It is only when the executive officer is granted "unfettered discretion" in making her decisions that the Court has not recognized a due process obligation to articulate reasons for the officer's decision. *See Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 467 (1981).

When, however, it is the decision of an officer of the *judicial* branch that is challenged, the Court has been historically reluctant to find that litigants have a due process right to an explanation for the officer's decision. Sometimes, consideration of this issue has been sidestepped by the Court's observation that the litigant simply had not looked hard enough to discover the judge's rationale. *See, e.g., Arizona v. Washington,* 434 U.S. 497, 517 (1978)(rejecting due process challenge to state trial court's failure to articulate factors considered in ordering mistrial since basis for ruling was "adequately disclosed by the record"); *TXO Prod. Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 464-65 (1993)(finding no due process violation based on failure of district court judge to provide reasons for upholding punitive damage award since district court had, during hearing on postverdict motions, indicated its agreement with jury's appraisal of egregious character of conduct of petitioner's executives). When the issue could not be disposed of in this fashion, the Court has reached arguably inconsistent results.

In *North Carolina v. Pierce,* 395 U.S. 711 (1969), the petitioners had successfully appealed their criminal convictions in state court. Following guilty verdicts on retrial, they were sentenced to longer prison terms than they had originally received following their first trials. *See id.* at 713-15. The Court held that, as an aspect of the petitioners' right to due

process, the state trial court was required to justify the longer sentence by articulating the basis for his decision. *See id.* at 726.

In *Harris v. Rivera*, 454 U.S. 339 (1981), the respondent, together with his wife and a third defendant, had been tried for burglary by a state court, sitting without a jury. *See id.* at 340. The trial court, on the identical evidence, found the respondent and his wife guilty while finding their codefendant not guilty. *See id.* On the respondent's habeas petition, the Second Circuit held that the trial court had violated the respondent's right to due process in failing to provide a rationale to justify this inconsistency on the record. *See id.* at 341 & n.4. In a per curiam opinion, this Court reversed, holding that "there is no federal requirement that a state trial court judge explain his reasons for acquitting a defendant in a state criminal trial; even if the acquittal rests on an improper ground . . . ." *Id.* at 344.

Whether *Harris* is actually inconsistent with *Pierce* is unclear. The state trial judge in *Harris* was acting as the trier of fact. He substituted, in effect, for a jury. Just as criminal defendants have never been thought to have a due process right to an explanation from a jury for its verdict, *Harris* may stand for nothing more than the proposition that criminal defendants have no greater due process right to an explanation for the verdict because their case is tried to the court, not a jury. Seen in this light, *Harris* does not stand for the more general proposition that the due process clause does not under any circumstances require an explanation for judicial conclusions.

The Court's failure to this point to have expressly required, as an aspect of a litigant's right to due process, an articulation of reasons for a judicial decision is not easy to understand. In imposing a "reasons" requirement on executive

officers, the Court has recognized that such a requirement operates instrumentally to help ensure that the decisions reached by the officer are rational. *See Wolff v. McDonnell*, 418 U.S. 539, 565 (1975); *Goldberg v. Kelly*, 387 U.S. 254, 271 (1970); *see also Dunlop v. Bachowski*, 421 U.S. 560, 572 (1976)("A 'reasons' requirement promotes thought by the Secretary and compels him to cover the relevant points and eschew irrelevancies."). Just why a "reasons" requirement would not equally assist the judicial officer in his work is not clear.

The Court has recognized that "there are occasions when an explanation of the reasons for a decision may be required by the demands of due process." *Harris v. Rivera*, 454 U.S. 339, 344 (1981). But because the Court has not specified how such occasions can be recognized, the circuit courts are presently disposing of large numbers of appeals by means of decisions that make no effort to provide the reasons for the court's decision. The Court should grant review to consider this question and establish the due process limits on the circuit courts' authority to issue unpublished opinions that contain no statement of the reasons underlying the decision.

V. The Rule 10 bases for review

A. The circuit split

Those who have studied the issue have discovered that the circuit courts, although in agreement on their authority to issue unpublished opinions and opinions containing no statement of reasons, are very widely separated in the extent to which they make use of this claimed authority and the procedures that are used. In the only detailed study that has apparently been done, professors Reynolds and Richman determined that in the 1978-79 reporting year, the use of

unpublished opinions varied from a high of 81.9% (Third Circuit) to a low of 31.8% (Eighth Circuit). *See* William Reynolds & William Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform,* 48 U. CHI. L. REV. 573, 587 (1981). The circuits were found to have split almost evenly with respect to their adoption of standards to govern which decisions were to be published and which were not to be published, with six circuits having adopted specific standards to govern this and five having adopted vague standards. *See id.* at 589. There was a similar even split with respect to rules that create presumptions as to publication, with six circuits having a presumption against publication and five circuits having no such presumption. *See id.* at 591. There was again an even split with respect to how each circuit makes the publication decision, with five circuits requiring that a majority of a panel vote for publication and six circuits permitting publication upon the vote of a single judge. *See id.* at 592.

With respect to the use by the circuit courts of unpublished decisions that contain no statement of the reasons underlying the decision, professors Reynolds and Richman discovered the same kind of split. Unpublished decisions containing no discernable justification constituted as few as 7.4% of the total unpublished opinions (Tenth Circuit) and as many as 85.2% of the total unpublished opinions (Third Circuit). *See id.* at 602.

As reflected by the examination of professors Reynolds and Richman, the circuit courts are very widely split with respect to virtually every aspect of their practice of issuing unpublished decisions generally and, in particular, their practice of issuing unpublished decisions containing no statement of reasons. Some part of the reason for this disparity may well be uncertainty as to the statutory and constitutional limits on the

circuit courts' discretion to adopt such practices. This Court should grant review to resolve this uncertainty.

B. The departure from the accepted and usual course of judicial proceedings

The "accepted and usual course of judicial proceedings" was, until relatively recently, that the circuit courts accompanied their decisions with published opinions that contained a statement of the reasons for the decisions. Again, this was, and continues to be, the very definition of a judicial "opinion." *See generally* BLACK'S LAW DICTIONARY 1092 (6th ed. 1990)(defining "opinion" to be a "statement by a judge or a court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based.").

As noted above, this is no longer the case with respect to all circuit court opinions and, in some circuits, with respect to even a majority of circuit court opinions. But this practice by the circuit courts has existed for less than thirty years. And more importantly, this practice has taken place without the approval of this Court, which has never considered its statutory and constitutional permissibility. In the exercise of the Court's supervisory power, it should now consider these issues.

C. The important question of federal law that has not been, but should be, settled by this Court

The use by the circuit courts of unpublished opinions — and in particular their use of unpublished opinions that contain no statement of the reasons underlying their decisions — raises serious statutory and constitutional issues under federal law. As noted previously, one widely respected study found that this

practice is believed to be a violation of due process by two thirds of the attorneys surveyed. *See* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 69 (1975). It has been condemned even by a number of the circuit court judges themselves. *See infra* at 20-21.

There is no reason to believe that this issue is going away any time soon. Until it is resolved by this Court, there will continue to be significant percentages of the bar and the bench itself who will continue to believe that the circuit courts simply have no statutory or constitutional authority to dispose of appeals by means of unpublished order opinions that say nothing about the reasons for the court's decision. The Court should grant review to resolve this issue once and for all.

CONCLUSION

The Petitioner would respectfully ask that a Writ of Certiorari issue to review the decision of the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

The opinion and judgment of the Fifth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[File stamped September 13, 2000]

No. 99-20556
con. w/ No. 99-20808

KATHERINE S. YOUNGBLOOD, individually and on behalf of Youngblood & Associates PLLC, formerly known as Youngblood & While, PLLC,

Plaintiff-Appellant,

versus

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; MARY J. MILLER,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas
(H-98-CV-1794)

Before WOOD*, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:**

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*Harlington Wood, Jr., Circuit of the Seventh Circuit, sitting by designation.

**Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

After reviewing the record, considering the briefs of the parties and argument of counsel and, with the single exception described below, we are persuaded that the district court committed no error.

The parties agree that the record reflects that the costs incurred by appellees were $27,645.77 instead of $30,000. The judgment of the district court is MODIFIED to award appellees the sum of $27,645.77 in costs instead of $30,000 awarded by the district court. The judgment of the district court is in all other respects affirmed.

AFFIRMED AS MODIFIED.

APPENDIX B

The decision of the Fifth Circuit denying Petitioners' Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[File stamped October 13, 2000]

No. 99-20556
Consolidated With
No. 99-20808

KATHERINE S. YOUNGBLOOD, individually and on behalf of Youngblood & Associates PLLC, formerly known as Youngblood & While, PLLC,

Plaintiff-Appellant,

versus

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; MARY J. MILLER,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 9/13/00, 5 Cir., _____, _____ F.3d _____)

Before WOOD*, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

*Harlington Wood, Jr., Circuit of the Seventh Circuit, sitting by designation.

Chief Judge King did not participate in the consideration of the rehearing en banc.

APPENDIX C

The decision of the District Court denying Petitioners' Motion to Remand

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[File stamped September 8, 1998]

KATHERINE S. YOUNGBLOOD, INDIVIDUALLY AND ON BEHALF OF YOUNGBLOOD & ASSOCIATES PLLC, F/K/A YOUNGBLOOD & WHITE, PLLC, Plaintiffs,	)	
v.	)	C.A. NO. H-98-1794
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, MARY J. MILLER, Defendants.	)	

ORDER

Plaintiff's Motion to Remand is hereby DENIED.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX D

The decision of the District Court imposing inherent power sanctions on Petitioners

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[File stamped July 26, 1999]

KATHERINE S. YOUNGBLOOD, INDIVIDUALLY AND ON BEHALF OF YOUNGBLOOD & ASSOCIATES PLLC, F/K/A YOUNGBLOOD & WHITE, PLLC, Plaintiffs,	)	
v.	)	C.A. NO. H-98-1794
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Defendant.	)	

ORDER

On this day the Court heard evidence and considered Defendant's Motion for Attorneys' Fees and Expenses and any responses thereto. The Court determined that plaintiffs had filed and/or conducted this litigation in bad faith, vexatiously, wantonly, or for oppressive reasons. The Court thus decided to grant the motion.

It is, therefore, ORDERED that Plaintiffs pay to Defendants the amount of $ 100,000 in attorney fees and $ 32,287 in expenses.

DONE this 23rd day of July, 1999.

By: /s/
UNITED STATES DISTRICT JUDGE